Darren P. Wong (SBN 170304)
State Compensation Insurance Fund
1275 Market Street, 3rd Floor
San Francisco, CA 94103-1410

Mailing Address: P.O. Box 3171
Suisun City, CA 94585-6171

Telephone: 415-581-4540
Fax: 415-581-4554

Attorney for Defendant
State Compensation Insurance Fund

02307056

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIO ALMARAZ,

Applicant,

v.

ENVIROSERVE; STATE COMPENSATION INSURANCE FUND,

Defendants.

Case No. ADJ 1078163
BAK 0145426

PETITION FOR RECONSIDERATION

Defendant STATE COMPENSATION INSURANCE FUND, the workers' compensation insurance carrier for Enviroserve, hereby petitions for reconsideration of the OPINION AND DECISION AFTER RECONSIDERATION issued herein on 02/03/09 by Workers' Compensation Appeals Board , on the grounds that:

1. By the order, decision or award the Appeals Board acted without or in excess of its powers;
2. The evidence does not justify the findings of fact; and
3. The findings of fact do not support the order, decision or award.

STATEMENT OF FACTS

Applicant, Mario Almaraz, sustained an admitted industrial injury to his back on November 5, 2004, while employed as a truck driver by Environmental Recovery Services (a.k.a. Enviroserve), insured by defendant, State Compensation Insurance Fund. Applicant was evaluated by Bruce E. Fishman, M.D., as an agreed medical evaluator (AME). In his initial report dated November 22, 2006, Dr. Fishman declared applicant to be permanent and stationary. He concluded that applicant has 12% whole person impairment (WPI) under the AMA Guides, based on a DRE lumbar category III. All references to the "AMA Guides" or to the "Guides" are to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (5th Edition, 2001). He also noted, however, that applicant is permanently limited to light duty work and permanently precluded from prolonged sitting activities.

On April 23, 2008, WCJ found that applicant's November 4, 2004 back injury caused 14% permanent disability, after apportionment. In making this permanent disability determination, the WCJ utilized the rating methodology established by the 2005 Schedule, including its provision that the extent of an injured employee's permanent impairment is determined by use of the AMA Guides. The WCJ concluded he was not free to make a permanent disability finding based on the work preclusions set forth by Dr. Fishman. The WCJ said that, in enacting Labor Code section 4660, the Legislature "mandated the use of the AMA Guide[s]." Specifically, he cited to section 4660(b)(1), which provides: "For purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]." The WCJ further stated, "it is within the purview of the Legislature to establish

the system for rating permanent disability." Because "the Legislature has established what that system is," the WCAB "is not at liberty to deviate from th[ose] criteria."

Applicant filed a timely petition for reconsideration. The Appeals Board as a whole issued an en banc decision 02/03/09 finding:

> (1) The AMA Guides portion of the 2005 Schedule is rebuttable;
>
> (2) The AMA Guides portion of the 2005 Schedule is rebutted by showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability; and
>
> (3) When an impairment rating based on the AMA Guides has been rebutted, the WCAB may make an impairment determination that considers medical opinions that are not based or are only partially based on the AMA Guides.

ISSUES

I. Is the Appeals Board's determination, that an impairment rating based upon the AMA guides is rebuttable, in direct contravention of the legislative intent of SB 899 as expressed in Labor Code section 4660?

II. Does the Appeals Board's determination that the AMA guides need only be "considered" rather than "incorporated" into the permanent disability rating, ignore the legislative history of SB 899 and the wider historical circumstances of its enactment?

III. Will the Appeals Board's decision cause a large increase in litigation which will overwhelm the WCAB and appellate courts and cause harm to injured workers by delaying the adjudication of their cases?

IV. Is it is within the legislature's purview to mandate the method of determining percentage of impairment and to establish the permanent disability rate and if so, does the Appeals Board have the authority to disregard the legislature's intent?

V. Did the case law relied upon by the Appeals Board address the AMA guides and their mandatory incorporation?

VI. Are the editorial comments cited by the appeals board relevant?

VII. Is the case law from other states relevant?

SUMMARY OF ARGUMENTS

- The WCAB's decision conflicts with the express language of Labor Code section 4660, subdivision (b)(1) which *requires* that the "nature of the physical injury or disfigurement" incorporate the "descriptions and measurements of physical impairments and the corresponding percentages of impairments" in the AMA Guides. Nothing in that section even remotely suggests that the WCAB may depart from the AMA Guides. The fact that a rating under the "new" PDRS is still "rebuttable" in some sense does not justify departing from the plain language of the statute.

- The WCAB's decision conflicts with the express language of Labor Code section 4660, subdivision (d) which *requires* that the new PDRS "promote consistency, uniformity, and objectivity." Allowing findings of physical impairment based upon evidence outside of the AMA Guides runs completely counter to this

statutory command and can only result in inconsistency, lack of uniformity, and subjective ratings.

- The WCAB's decision conflicts with the express intent of the legislature in adopting SB 899—an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs. Allowing findings of physical impairment based upon evidence outside of the AMA Guides can only result in increased costs and delays due to increased litigation as the WCAB strives to fashion a PD award that it deems "fair" in each and every case.

- The WCAB's decision usurps the Legislature's role assigned it by our California Constitution which gave the Legislature "plenary power" to create and enforce a complete system of workers' compensation, by appropriate legislation. The WCAB does not have the authority to second-guess the policy decision of the legislature, in addressing the workers' compensation crisis, that it was necessary to have an objective, consistent, measurable basis for assessing physical impairment in order to promote cost savings. It is for the Legislature, not the courts, to pass upon the social wisdom of an enactment. And, if there is a flaw in the statutory scheme, it is up to the Legislature, not the courts, to correct it.

ARGUMENT

I.

THE APPEALS BOARD'S DETERMINATION THAT AN IMPAIRMENT RATING BASED UPON THE AMA GUIDES IS REBUTTABLE IS IN DIRECT CONTRAVENTION OF THE LEGISLATIVE INTENT IN THE ADOPTION OF SB899 AS EXPRESSED IN LABOR CODE SECTION 4660.

With SB 899, the legislature intended to require that all findings of physical injury or disfigurement be based upon the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the AMA Guides. Their intent is clear from the wording of Labor Code § 4600. Prior to SB 899 Labor Code § 4660 read:

> (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.
>
> (b) The administrative director may prepare, adopt, and from time to time amend, a schedule for the determination of the percentage of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.
>
> (c) Any such schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities which result from compensable injuries received or occurring on and after the effective date of the adoption of such schedule, amendment or revision, as the fact may be.

> (d) On or before January 1, 1995, the administrative director shall review and revise the schedule for the determination of the percentage of permanent disabilities. The revision shall include, but not be limited to, an updating of the standard disability ratings and occupations to reflect the current labor market. However, no change in standard disability ratings shall be adopted without the approval of the Commission of Health and Safety and Workers' Compensation. A proposed revision shall be submitted to the commission on or before July 1, 1994.

In addition to other changes, SB 899 amended Labor Code § 4600 by:

> **(1)** added subds (b)(1) "For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)."
>
> **(2)** amended subd (d) by adding the first sentence "The schedule shall promote consistency, uniformity, and objectivity."

The rules governing statutory construction are well established. The Appeals Board's objective should be to ascertain and effectuate legislative intent. (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 [14 Cal. Rptr. 2d 514, 841 P.2d 1034]; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [3 Cal. Rptr. 3d 390, 74 P.3d 166].) In determining legislative intent, the Appeals Board should look to the statutory language itself. (*Mejia v. Reed, supra,* 31 Cal.4th at p. 663 [3 Cal.Rptr.3d 390].) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . . ." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299].) But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose.

"The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) Thus, "every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." (*Moore v. Panish* (1982) 32 Cal.3d 535, 541 [186 Cal. Rptr. 475, 652 P.2d 32]; see also *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *City of Huntington Beach v. Board of Administration, supra,* 4 Cal.4th at p. 468.) Where several codes are to be construed, they 'must be regarded as blending into each other and forming a single statute.' Accordingly, they 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.' (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679 [131 Cal. Rptr. 789, 552 P.2d 749], *Mejia v. Reed, supra,* 31 Cal.4th at p. 663.)

When an examination of statutory language in its proper context fails to resolve an ambiguity, Courts also may turn to the legislative history of an enactment as an aid to its interpretation. (See, e.g., *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239 [8 Cal. Rptr. 2d 298]; "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387.)

If ambiguity still remains courts cautiously take the third and final step in statutory construction and "apply reason, practicality, and common sense to the language at hand." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc., supra,* 6 Cal.App.4th at p. 1239; see also, e.g., *Mejia v. Reed, supra,* 31 Cal.4th at p. 663.) "Where uncertainty exists consideration should be given to the consequences that will flow from a particular

interpretation." (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387.)

Ia. The clear and unambiguous language in Labor Code section 4660(b)(1) states the nature of physical injury or impairment **shall incorporate** the percentages of impairments from the AMA Guides, yet, the Appeals Board's decision requires only that the AMA Guides be "considered."

Defendant respectfully contends the Appeals Board did not apply the well established rules governing statutory construction in its analysis of the language in Labor Code section 4660(b)(1). Section 4660(b)(1) requires that the nature of the physical injury or disfigurement **shall incorporate** the percentages of impairments from the AMA Guides. In its decision the Appeals Board writes:

> Once again, section 4660(c) still provides that the Schedule is "prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." Because section 4660(c) still provides that the Schedule is rebuttable, then no portion of it – including the AMA Guides portion – is conclusive. Any contrary interpretation would nullify, at least in part, the language of section 4660(c). Moreover, had the legislature intended that the AMA Guides portion of the Schedule be unrebuttable, it could have expressly so stated. It did not.
> Further, although section 4660(b)(1) states that "[f]or purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of [the AMA Guides]," section 4660(a) also states that "[i]n determining the percentages of permanent disability, *account shall be taken* of the nature of the physical injury or disfigurement. . . ." (Emphasis added.) Therefore, section 4660(a) requires *consideration* of the AMA Guides. It does not make the AMA Guides determinative in assessing an injured employee's impairment.
> We are aware that when SB 899 amended section 4660, the Legislature provided that "[t]he schedule shall promote consistency, uniformity, and objectivity." (Lab. Code, § 4660(d).)

> Nevertheless, we do not believe that in enacting this provision the Legislature intended to preclude an injured employee – or an employer – from rebutting the AMA Guides portion of the 2005 Schedule.

The Appeals Board did not fully appreciate the clear and unambiguous language of Labor Code § 4660(b)(1) when it found: "Because section 4660(c) still provides that the Schedule is rebuttable, then no portion of it – including the AMA Guides portion – is conclusive." The clear and unambiguous language of Labor Code § 4660(b)(1) mandates the nature of the physical injury or disfigurement shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition). According to the Merriam Webster Dictionary, "shall" is used in laws, regulations, or directives to express what is mandatory (i.e. it *shall* be unlawful to carry firearms). Furthermore, it is a principle of statutory construction that the word "shall," as used in the Labor Code, ordinarily connotes a mandatory duty. see, *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357; *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 109; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907. In fact, the labor code itself declares that "shall" in statutory construction means mandatory. Labor Code § 15 specifically states: '"Shall" is mandatory and "may" is permissive.'

Section 4660(c) states the general intent of the legislature that the Permanent Disability Schedule is prima facie evidence of the percentage of permanent disability. In contrast, section 4660(b)(1) states the particular intent of the legislature that the nature of the physical injury or disfigurement **shall** incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the AMA Guides. In the construction of a statute, when a general and particular provision are inconsistent, the latter is paramount to the former. A code section stating

the particular intent of the legislature will control a general one that is inconsistent with it. See (Sec. 1859, Code Civ. Proc.) Accordingly, Labor Code section 4660(b)(1) controls section 4660(c).

The Appeals Board contradicts the clear and unambiguous language of Labor Code § 4660(b)(1) by finding a workers' compensation judge may make an impairment determination that considers medical opinions that are not based or are only partially based on the AMA Guides; when the judge believes an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability.

Ib. The legislature clearly stated in Labor Code section 4660(d), that the schedule **shall promote consistency, uniformity, and objectivity**; the Appeals Board's finding that a party may rebut the AMA Guides portion of the schedule will promote inconsistency, chaos, and subjectivity, and will increase litigation and costs.

The clear and unambiguous language added by SB 899 states that the schedule **shall promote consistency, uniformity, and objectivity**. However, the Appeals Board does not appear to fully appreciate the legislature's stated intent. Antithetical to the clear and unambiguous language of Lab. Code, § 4660(d), is the Appeals Board's finding that the AMA Guides portion of the 2005 Schedule is rebutted by a showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. The Appeals Board's findings simply does not

comport with the stated legislative intent and the goal of bringing more certainty and objectivity to a workers' compensation system that was in crisis.

Assuming the Appeals Board disputes the plain meaning of Labor Code §§ 4660(b)(1) and 4660(d), then "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) Thus, "every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." (*Moore v. Panish* (1982) 32 Cal.3d 535, 541 [186 Cal. Rptr. 475, 652 P.2d 32]; see also *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *City of Huntington Beach v. Board of Administration, supra,* 4 Cal.4th at p. 468.) Accordingly, the question for the Appeals Board is how to harmonize the various sections of Labor Code § 4660. The Appeals Board states:

> Once again, section 4660(c) still provides that the Schedule is "prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." Because section 4660(c) still provides that the Schedule is rebuttable, then no portion of it – including the AMA Guides portion – is conclusive. Any contrary interpretation would nullify, at least in part, the language of section 4660(c) . . .
>
> We are aware that when SB 899 amended section 4660, the Legislature provided that "[t]he schedule shall promote consistency, uniformity, and objectivity." (Lab. Code, § 4660(d).) Nevertheless, we do not believe that in enacting this provision the Legislature intended to preclude an injured employee – or an employer – from rebutting the AMA Guides portion of the 2005 Schedule.

The Appeals Board finding renders Labor Code § 4660(b)(1) and 4660(d) ineffective and meaningless. It is a cardinal rule of construction that, where possible,

every clause and word of a statute should be given effect and meaning. (Sec. 1858, Code Civ. Proc.; *Smith* v. *State Board of Control*, 215 Cal. 421 [10 P.2d 736]; *County of Los Angeles* v. *Graves*, 210 Cal.21 [290 P. 444]; *Crowe* v. *Boyle*, 184 Cal. 117 [193 P. 111]; *Gill* v. *Johnson*, 103 Cal. App. 234 [284 P. 510]; *Cory* v. *Cooper*, 117 Cal. App. 495 [4 P.2d 581].) The only interpretation that gives effect and meaning to § 4660(b)(1) and § 4660(d) is that all impairment ratings must incorporate **the percentages of impairments** from the AMA Guides and that goal in implementing the new schedule was to promote **consistency, uniformity, and objectivity**.

Finding the AMA Guides are mandatory in regards to the nature of the physical injury or disfigurement does not nullify Labor Code § 4660(c), contrary to the opinion of the Appeals Board. According to Labor Code § 4660(a):

> In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

Physical injury or disfigurement is only one of four factors to be considered by the Permanent Disability Rating Schedule. This was true before the legislature amended Labor Code § 4660. SB 899 added the requirement that the nature of the physical injury or disfigurement shall incorporate the descriptions, measurements and the percentages of impairments from the AMA Guides.

The Appeals Board's finding that, "Because section 4660(c) still provides that the Schedule is rebuttable, then no portion of it – including the AMA Guides portion – is conclusive" leads to disharmony in interpreting the provisions of Labor Code § 4660 and results in inconsistency. Absurd or unjust results will never be ascribed to the legislature

and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context. See *Wells Fargo & Co.* v. *Mayor etc. of Jersey City*, (1913) 207 F. 871, 874. A more harmonious interpretation is that the legislature intended for the AMA Guides to be mandatory for measuring nature of the physical injury or disfigurement and determining the percentages of impairments while allowing rebuttal of the schedule in other respects.

The Appeals Board also does not fully appreciate the clear and unambiguous language of Labor Code § 4660(a) when it writes:

> Further, although section 4660(b)(1) states that "[f]or purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of [the AMA Guides]," section 4660(a) also states that "[i]n determining the percentages of permanent disability, *account shall be taken* of the nature of the physical injury or disfigurement. . . ." (Emphasis added.) Therefore, section 4660(a) requires *consideration* of the AMA Guides. It does not make the AMA Guides determinative in assessing an injured employee's impairment." [Emphasis in original.]

The clear and unambiguous language of Labor Code § 4660(a) and § 4660(b)(1) when read together states that in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement which shall incorporate the descriptions, measurements and corresponding percentages of impairments published in the AMA Guides. Contrary to the Appeals Board's interpretation, Labor Code § 4660 requires more than mere consideration of the AMA Guides. It requires incorporation of the descriptions, measurements and corresponding percentages of impairments published in the AMA Guides. The Appeals Board's decision contravenes the clear and unambiguous language of Labor Code § 4660 by allowing the WCAB to make an impairment determination that considers medical

opinions that are not based or are only partially based on the AMA Guides thereby failing to incorporate the percentages of impairments published in the AMA Guides.

II.

THE APPEAL'S BOARD'S DETERMINATION THAT THE AMA GUIDES NEED ONLY BE "CONSIDERED" RATHER THAN "INCORPORATED" INTO THE PERMANENT DISABILITY RATING AS MANDATED BY THE STATUTE IGNORES THE LEGISLATIVE HISTORY OF SB 899 AND THE WIDER HISTORICAL CIRCUMSTANCES OF ITS ENACTMENT.

The legislative history of SB 899 and the wider historical circumstances of its enactment indicate the legislature intended to require that all findings of physical injury or disfigurement be based upon the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the AMA guides. When an examination of statutory language in its proper context fails to resolve an ambiguity, Courts also may turn to the legislative history of an enactment as an aid to its interpretation. (See, e.g., *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239 [8 Cal. Rptr. 2d 298]; "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387.)

Senate Bill No. 899 (2003-2004 Reg. Sess.) was an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs. (See Stats. 2004, ch. 34, § 49 [bill urgency measure needed "to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time"]; Assem.

Republican Caucus, Analysis of Sen. Bill No. 899 (2003-2004 Reg. Sess.) as amended Apr. 15, 2004, p. 6 [listing as first argument in support of the bill the need to reduce the highest state workers' compensation costs in the nation]; Assem. Com. on Insurance, Analysis of Sen. Bill No. 899 (2003-2004 Reg. Sess.) as proposed to be amended July 9, 2003, p. 4 [identifying "crisis" linked to "skyrocketing costs"].) see *Brodie v. Contra Costa County Fire Protection District* 72 Cal. Comp. Cas 565; 2007 Cal. Wrk. Comp. LEXIS 159; 40 Cal. 4th 1313; 156 P.3d 1110; 57 Cal. Rptr. 3d 644, May 3, 2007

Accordingly, the wider historical circumstances indicate the Legislature intended to reduce the highest state workers' compensation costs in the nation with enactment of SB 899.

Further evidence of the Legislatures intent is found in the transcript of the 04/15/04 Conference Committee on SB 899. During that hearing, the bills author Senator Poochigian stated:

> First, I think perhaps there's been inadequate attention to the reason that this debate has taken place and that we are here at this point today, and that is, the crisis in California of the very high cost of workers' compensation which is really representative or emblematic of a deeper set of economic problems facing our state. We have just over the course of the last 24 hours learned that California has added just 5000, slightly over 5,000, jobs in the month of March compared to 308,000 nationwide. We do have problems and we are, in fact, the drag on the national economy, and workers' comp is viewed generally throughout the county—and certainly in the State of California—by employers, public and private, as being one of the most significant issues that is an impediment to job creation, to job growth, to inducing companies from out of state, to locate here, and making it tougher for public agencies as well to make ends meet with the taxpayer support that they receive. So it is in fact that issue which drives the debate and brings us to this point. . . .
>
> The problems in the system, generally speaking, have to do with arbitrariness, with delay, with costliness, all of which add not only to expense but also foster an environment in which there is a great deal of litigation. And the system that was not meant to be litigated or in which

> litigation was to be minimized, there's been a great deal of litigation and it's really the result of frustration and anxiety and delay. So by the adoption of standards of evidence-based, scientific standards, nationally approved standards, in terms of--for example, the ACOEM guidelines in medical care component or element of workers' comp reform--AMA guides, with respect to physical disability and the permanent disability ratings, that part of the system that we seek to modify, those are very, very important. They bring stability to the system, predictability to the system, reduce costs, reduce delay, and reduce the level of anxiety that is otherwise felt by many of those who have to deal with the system.

While the opinion of a single legislator, including the author, may not reflect the intent of the entire legislature; it is also well established that transcripts of committee hearings constitute cognizable legislative history documents. See *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 376 [2 Cal. Rptr. 3d 655, 73 P.3d 517]; *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519, fn. 5 [106 Cal. Rptr. 2d 548, 22 P.3d 324] *Kaufman & Broad Communities v. Performance Plastering Inc.,* (2005, 3rd District) 133 Cal.App.4th 26, 30.

Further evidence of the legislature's intent can be found in the proposed report of the same 04/15/04 Conference Committee. At item 14 the Proposed Report states:

Revise the process for determining the percentage of permanent disability.
The bill:

a) Requires that the nature and scope of the injury or disfigurement be based on the Guides to the Evaluation of Impairment (5th Edition).

The word "require" means "to direct, order, demand, instruct, command, ... [and] compel." (*In re Barfoot* (1998) 61 Cal.App.4th 923, 931 [quoting from Black's Law Dict. (6th ed. 1990), at p. 1304.) Committee Hearing Reports constitute cognizable legislative history documents per *Kaufman & Broad Communities v. Performance Plastering Inc.,* (2005) 133 Cal.App.4th 26, *Post v. Prati* (1979) 90 Cal.App.3d 626, 634. Furthermore,

judicial notice may be taken under Evidence Code section 452(c) of "official acts of the legislative, executive and judicial departments of the United States, or any state of the United States." (*People v. Snyder* (2000) 22 Cal.4th 304, 315 fn.5; *Delaney v. Baker* (1999) 20 Cal.4th 23, 30; *Post v. Prati* (1979) 90 Cal.App.3d 626, 634.) Defendant respectfully requests the Appeals Board take Judicial notice of the transcript and Proposed Report from the 04/15/04 Conference Committee on SB 899.

It is clear from these documents that the legislature intended to require that the nature and scope of the injury or disfigurement incorporate the descriptions, measurements and corresponding percentage of impairment as published in the AMA Guides. In construing a statute, it is the paramount duty of the court to ascertain its true meaning, that is, to understand the purposes and objects thereof. See *Fairman v. Mors* (1942, Cal App) 55 Cal App 2d 216, 130 P2d 448, 1942 Cal App LEXIS 45; *Estate of Morris* (1943, Cal App) 56 Cal App 2d 715, 133 P2d 452, 1943 Cal App LEXIS 238. Defendant respectfully contends the intent of the Legislature was to address the problems of arbitrariness, delay, and costliness which fostered an environment in which there was a great deal of litigation in a system in which litigation was to be minimized. The legislature's solution was to adopt nationally approved evidence-based scientific standards in the form of the AMA Guides with respect to physical disability and the permanent disability ratings. The Appeals Board's determination that the AMA Guides need only be "considered" rather than "incorporated" into the permanent disability rating, does not comport with the true meaning and purpose of Labor Code section 4660.

III.

THE APPEALS BOARD'S DECISION WILL CAUSE A MASSIVE INCREASE IN LITIGATION WHICH WILL OVERWHELM THE WCAB AND APPELLATE COURTS AND CAUSE HARM TO INJURED WORKERS BY DELAYING THE ADJUDICATION OF THEIR CASES.

The Legislature clearly intended for the AMA Guies to bring **consistency, uniformity, and objectivity** to the rating of impairment. Finding the AMA Guides rebuttable has the opposite effect. The rating of permanent disability would become inconsistent, not uniform and subjective thereby resulting in increased litigation and uncertainty. The Appeal Board's decision will result in dramatic increase in costs to the system from increased litigation due to the fact there are no guidelines in *Almaraz* for correlating between disability, loss of work ability and impairment. In a recent interview, the AME in *Almaraz*, Dr. Fishman stated he foresees physicians writing supplemental reports for conditions that feature many subjective complaints such as fibromyalgia. He also predicted increased litigation and depositions as parties attempt to define what constitutes adequate medical evidence to support an impairment rating.

Defendant respectfully contends that the Appeals Board failed to fully consider the far-reaching consequences of its decision. Such a consideration is appropriate here. As noted above, in regards to statutory construction, if ambiguity still remains, courts cautiously take the third and final step in statutory construction and "apply reason, practicality, and common sense to the language at hand." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc., supra,* 6 Cal.App.4th at p. 1239; see also, e.g., *Mejia v. Reed, supra,* 31 Cal.4th at p. 663.) "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc. v. Fair*

Employment & Housing Com., supra, 43 Cal.3d at p. 1387.) When reason, practicality, and common sense are applied to the language in Labor Code § 4660, the only possible conclusion is that the legislature intended for the AMA Guides to be mandatory. Furthermore, the consequences of the Appeals Board's decision will be uncertainty, subjectivity and a massive increase in litigation.

In *Ogilvie v. City and County of San Francisco* (en banc) ADJ 1177048 (SFO 0487779) the Appeals Board, in regards to Diminished Future Earnings Capacity, opined that the use dueling vocational experts would defeat the legislature's intention to reduce costs and defeat the legislature's intention to promote consistency, uniformity, and objectivity in permanent disability determinations:

> Second, the Legislature declared its general intention that SB 899 would "provide relief to the state from the effects of the current workers' compensation crisis." (Stats. 2004, ch. 34, § 49.) As the appellate courts have repeatedly made clear, this statement means that SB 899 was intended to reduce the costs of the workers' compensation system. Furthermore, the Legislature declared its specific intention that "[t]he [permanent disability] schedule shall promote consistency, uniformity, and objectivity." (Lab. Code, § 4660(d).) It seems likely that neither of the Legislature's intentions would be served if the DFEC opinions of vocational rehabilitation experts are the primary basis for determining an employee's permanent disability. That is, if parties routinely use dueling vocational experts, or even one agreed vocational expert, then the costs of administering the workers' compensation system may well increase. This would defeat the Legislature's intention to reduce costs. Also, if the assessment of an injured employee's permanent disability was largely based on vocational experts' opinions on DFEC (which, by experience, can vary much more widely than the vocational expert opinions here), then the employee's permanent disability rating would largely be determined by which expert the trier-of-fact accepted. This would defeat the Legislature's intention to "promote consistency, uniformity, and objectivity" in permanent disability determinations.
>
> Accordingly, we conclude that, in the usual case, there is not a one-to-one correlation between an injured employee's diminished future earning capacity and his or her disability.

Defendant respectfully contends allowing the WCAB to make an impairment determination that considers medical opinions that are not based or are only partially based on the AMA Guides will also defeat the legislature's intention to reduce costs and defeat the legislature's intention to promote consistency, uniformity, and objectivity in permanent disability determinations.

IV.

IT IS WITHIN THE LEGISLATURE'S PURVIEW TO MANDATE THE METHOD OF DETERMINING PERCENTAGE OF IMPAIRMENT AND TO ESTABLISH THE PERMANENT DISABILITY RATE; THE APPEALS BOARD DOES NOT HAVE THE AUTHORITY TO DISREGARD THESE METHODS DUE TO ITS PERCEPTION OF UNFAIRNESS OF THE RESULTING PD AWARD.

The California Constitution gave the Legislature "plenary power" to create and enforce "a complete system of workers' compensation, by appropriate legislation...." See Cal. Const., Art.14, § 4. Accordingly, defendant respectfully asserts the WCAB does not have the authority to second-guess the policy decision of the legislature, in addressing the workers' compensation crisis, that it was necessary to enact an objective, consistent, measurable basis for assessing physical impairment in order to promote cost savings. See *Rio Linda Union Sch. Dist. v. Workers' Comp. Appeals Bd. [Scheftner]* (2005) 131 Cal. App. 4th 517, 532 [31 Cal. Rptr. 3d 789, 70 Cal. Comp. Cases 999]

The Court of Appeal, Third Appellate District observed in regards to a different issue, "It is for the Legislature, not the courts, to pass upon the social wisdom of such an enactment. And, if there is a flaw in the statutory scheme, it is up to the Legislature, not

the courts, to correct it." *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 334 [265 Cal. Rptr. 788, 55 Cal. Comp. Cases 44].

The Appeals Board substituted its judgment for that of the legislature by finding the AMA Guides' portion of the 2005 Schedule is rebutted by showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. However, the a workers' compensation judge's finding of unfairness cannot be the basis for disregarding the legislature's intent in amending Labor Code section 4660. In regards to a different section of the Labor Code, the court in *Neighbours* stated, "although plaintiff believes that a strict application of section 2750.5 is unfair in some circumstances, we must presume that the Legislature intended all the consequences which flow from the plain meaning of the statute." *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 333.

By requiring that all findings of permanent disability incorporate the percentages of impairments published in the AMA Guides, the legislature mandated the method of arriving at percentages of impairment. Furthermore, the California Supreme Court has held that Labor Code § 4658 should be read as "a general provision establishing the amount of compensation benefits for a permanent disability." *Brodie v. Contra Costa County Fire Protection District* . (2007) 40 Cal. 4th 1313, 156 P.3d 1100, 57 Cal. Rptr. 644, 72 Cal. Comp. Cases 565. Permanent disability payments are calculated by first expressing the degree of permanent disability as a percentage and then converting that percentage into an award based on a table pursuant to Labor Code § 4658. Notably, "[t]he percentage level of permanent disability represents only a point on a relative scale." (1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed. 2007), § 8.02[2], p. 8-6.) Thus, a rating of 50 percent has no real-world significance, other than

to indicate that the injured worker is more disabled than someone with a 45 percent rating and less disabled than someone with a 55 percent rating. See *Brodie v. Contra Costa County Fire Protection District* (2007) 40 Cal. 4th 1313 footnote 4, 156 P.3d 1100, 57 Cal. Rptr. 644, 72 Cal. Comp. Cases 565.

The right to workers' compensation benefits is "wholly statutory" (*Johnson* v. *Workmen's Comp. App. Bd.* (1970) 2 Cal.3d 964, 972 [88 Cal.Rptr. 202, 471 P.2d 1002]; *Ruiz* v. *Industrial Acc. Com.* (1955) 45 Cal.2d 409, 414 [289 P.2d 229]), and is not derived from common law. (*Carrigan* v. *California State Legislature* (1959) 263 F.2d 560, 567; *Coleman* v. *Silverberg Plumbing Co.* (1968) 263 Cal.App.2d 74, 84-85 [69 Cal.Rptr. 158]; see *Alaska Packers Assn.* v. *Indus. Acc. Com., supra*, 1 Cal.2d at p. 256; *Argonaut Mining Co.* v. *Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, 29 [230 P.2d 637].) This statutory right is exclusive of all other statutory and common law remedies, and substitutes a new system of rights and obligations for the common law rules governing liability of employers for injuries to their employees. (*Fitzpatrick* v. *Fidelity & Casualty Co.* (1936) 7 Cal.2d 230, 233 [60 P.2d 276]; *Alaska Packers Assn.* v. *Indus. Acc. Com.* (1927) 200 Cal. 579, 583 [253 P. 926]; see *Tipton* v. *Atchison Ry. Co.* (1935) 298 U.S. 141, 153-154 [80 L.Ed. 1091, 1098-1099, 56 S.Ct. 715, 104 A.L.R. 831]; *Hazelwerdt* v. *Industrial Indem. Exchange* (1958) 157 Cal.App.2d 759, 762 [321 P.2d 831].) Accordingly, it is within the legislature's purview to mandate the method of determining the percentage of impairment and to establish the permanent disability rate. Respectfully, defendant contends the Appeals Board does not have authority to find the AMA Guides rebuttable because they are dissatisfied with the permanent disability award in a particular case.

V.

TO SUPPORT ITS FINDING THAT THE AMA GUIDES ARE REBUTTABLE, THE APPEALS BOARD RELIED UPON CASES THAT PRE-DATE THE IMPLEMENTATION OF SB899 AND DO NOT ADDRESS THE AMA GUIDES AND THEIR MANDATORY INCORPORATION

The Appeals Board relies upon several cases to support its position that the 2005 schedule is rebuttable. However, none of the cases cited address whether the AMA Guides' portion of the schedule is rebuttable. Other than *Costa*, the cases relied upon by the Appeals Board also predate implementation of SB 899. For example, the Appeals Board relies upon *Glass v. Workers' Comp. Appeals Bd.*, (1980) 105 Cal. App. 3d 297. In *Glass* the court found that when work restrictions are involved concerning bodily parts not specifically stated in the Guidelines for Work Capacity, the rater must evaluate the standard rating appropriate for the work restriction by analogy or comparison and achieve a judgment rating. By amending Labor Code § 4600(b)(1), the legislature intended to eliminate the Guidelines for Work Capacity. Accordingly, the holding in *Glass* is not relevant to the issue of whether the AMA Guides are rebuttable. In *Luchini v. Workmen's Comp Appeals Bd* (1970) 35 Cal. Comp. Cas 205, the trial judge refused to incorporate, as factors of permanent disability, certain work restrictions recommended by the medical experts. The ground relied on by the Board was that the restrictions were "prophylactic" in nature, designed only to avoid further injury and were not restrictions imposed "by reason of" his disability. The Court of Appeal disagreed.

At the time these cases were decided, Labor Code § 4660 did not contain the requirement that the nature of physical injury or disfigurement **shall** incorporate the

descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the AMA Guides. The above-cited cases do not address the issue at hand and, therefore, are not persuasive.

VI.

THE LEGISLATURE DID NOT ADOPT THE FULL TEXT OF THE AMA GUIDES, THEREFORE, THE EDITORIAL COMMENTS CITED BY THE APPEALS BOARD ARE NOT RELEVANT

The Appeals Board relied upon the fact the editors of the AMA Guides recognize that it is merely a first step for measuring work impairment. As a result, the Appeals Board opined that other factors outside the Guides may be considered in determining the percentage of impairment. The Appeals board appears to equate impairment ratings based upon the AMA Guides and permanent disability ratings. However, they are not the same.

According to Labor Code § 4660(a):

> In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

Physical injury or disfigurement, incorporating the percentages of impairments from the AMA Guides, is only one of four factors to be considered in determining the percentage of permanent disability. Therefore, statements by the editors regarding the AMA Guides' shortcomings when it comes to measuring work impairment are not relevant since the legislature addressed those concerns by providing modifiers for age, occupation and Diminished Future Earnings Capacity to arrive at a permanent disability rating.

Furthermore, the legislature specifically mandated that the descriptions and measurements of physical impairments and the corresponding percentages of impairments **shall be incorporated** into the nature of the physical injury or disfigurement portion of the permanent disability rating. Therefore, the legislature intended to require use of the AMA Guides despite the editorial language regarding their shortcomings.

VII.

THE CASE LAW FROM OTHER STATES CITED BY THE APPEALS BOARD IS NOT PERSUASIVE BECAUSE THEIR ENABLING STATUTES ARE BASED UPON A SYSTEM IN WHICH THE AMA GUIDES ARE OPTIONAL

The Appeals Board cites several cases from other states in which courts have recognized that the AMA Guides, in effect, are rebuttable, i.e., that the Guides do *not* foreclose any other evidence of, or means for assessing, permanent impairment. However, the case law from other states cited by the Appeals Board is not persuasive because their enabling statutes specifically indicate that the AMA Guides are optional. For example, Arizona law provides that a "physician **should** rate the percentage of impairment using the standards for the evaluation of permanent impairment as published by the most recent edition of the AMA Guides, **if applicable**." (Ariz. Admin. Code R20-5-113(B)(1) [formerly known as R4-13-113(D) or "Rule 13(d)"]. [Emphasis added.]) The Appeals Board ignores the fact that the Arizona statute, A.C.R.R. R4-13-113(D), states that the AMA guides **should be used if applicable**. This is far different than Labor Code § 4660 which states the nature of physical injury or disfigurement **shall** incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the AMA Guides. The Arizona Supreme Court

addressed the legal effect of **should be used if applicable** in, *Slover Masonry v. Industrial Comm'n* (1988), 158 Ariz. 131:

> The AMA Guides are only a tool adopted by administrative regulation to assist in ascertaining an injured worker's percentage of disability. Thus, when the AMA Guides do not truly reflect a claimant's loss, the ALJ must use his discretion to hear additional evidence and, from the whole record, establish a rating independent of the AMA recommendations. That is why A.C.R.R. R4-13-113(D) states that the AMA Guides "should" be used to establish a rating of functional impairment "*if applicable*" (emphasis added). If an injury has resulted in a functional impairment not adequately reflected by clinical measurement under the AMA Guides, then an ALJ must consider impact on job performance." [emphasis added in original]

It is clear that the Arizona court's finding that AMA Guides are rebuttable is due to the Arizona legislature's use of "should" and "if applicable" in A.C.R.R. R4-13-113(D). Accordingly, Defendant respectfully contends that case law from Arizona, or any other states, has no precedential value.

VIII.

CONCLUSION

The WCAB's decision conflicts with the express language of Labor Code section 4660, subdivision (b)(1) which *requires* that the "nature of the physical injury or disfigurement" incorporate the "descriptions and measurements of physical impairments and the corresponding percentages of impairments" in the AMA Guides. Nothing in that section even remotely suggests that the WCAB may depart from the AMA Guides. The

fact that a rating under the "new" PDRS is still "rebuttable" in some sense does not justify departing from the plain language of the statute.

Furthermore, the Appeals Board's decision conflicts with the express language of Labor Code section 4660, subdivision (d) which *requires* that the new PDRS "promote consistency, uniformity, and objectivity." Allowing findings of physical impairment based upon evidence outside of the AMA Guides runs completely counter to this statutory command and can only result in inconsistency, lack of uniformity, and subjective ratings. It also conflicts with the express intent of the legislature in adopting SB 899—an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs. Allowing findings of physical impairment based upon evidence outside of the AMA Guides can only result in increased costs and delays due to increased litigation as the WCAB strives to fashion a PD award that it deems "fair" in each and every case.

Lastly, the WCAB's decision usurps the Legislature's role assigned it by our California Constitution which gave the Legislature "plenary power" to create and enforce a complete system of workers' compensation, by appropriate legislation. The WCAB does not have the authority to second-guess the policy decision of the legislature, in addressing the workers' compensation crisis, that it was necessary to have an objective, consistent, measurable basis for assessing physical impairment in order to promote cost savings. It is for the Legislature, not the courts, to pass upon the social wisdom of an enactment. And, if there is a flaw in the statutory scheme, it is up to the Legislature, not the courts, to correct it.

The Appeals Board's en banc decision in the above captioned case has far reaching implications for the people of California and involves issues of great importance regarding interpretation of Labor Code section 4660. Although some may argue the Appeals Board's decision is not a final order, reconsideration is appropriate for the

purpose of an expeditious consideration of new legislation and for important statutory interpretation. See *Harrison v. WCAB* (1974) 44 CA3rd 197. Furthermore, a 'final order' for purposes of Labor Code section 5900 includes any order which settles, for purposes of the compensation proceeding, an issue critical to the claim for benefits, whether or not it resolves all the issues in the proceeding or represents a decision on the right to benefits." *Maranian v. WCAB*, (2000) 65 CCC 650. See *Kleeman v. WCAB,* (2005) 70 CCC 133. See also *Safeway Stores Inc. v. WCAB,* (1980) 45 CCC 410.) Defendant respectfully contends the Appeals Board's findings in the above captioned case settles an issue critical to the claim for benefits.

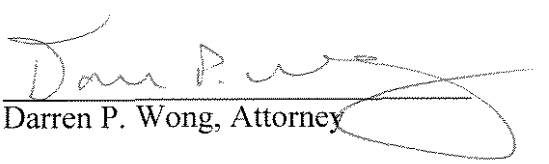
Defendant is newly aggrieved by the Appeals Board's decision. Pursuant to Labor Code §§5902, 5903 & 5906 an aggrieved party is expressly allowed to seek reconsideration of any final decision "made and filed *by the appeals board*" and it expressly allows the Appeals Board, on reconsideration, to "affirm, *rescind, alter, or amend*" its prior decision. Further, there is no statute, rule, or case law that precludes the en banc Appeals Board from revisiting and reversing a prior Appeals Board en banc decision. Section 115 permits "the appeals board as a whole" to issue en banc decisions (see also Gov. Code, § 11425.60(b)), and Appeals Board Rule 10341 provides that '[e]n banc decisions of the Appeals Board are binding *on panels* of the Appeals Board and Workers' Compensation Judges as legal precedent under the principle of stare decisis.' (Cal. Code Regs., tit. 8, § 10341 (emphasis added).) Rule 10341 does not make en banc decisions binding on the Appeals Board sitting en banc. Due to the fact the above captioned case, as an en banc decision, is binding *on panels* of the Appeals Board and Workers' Compensation Judges as legal precedent under the principle of stare decisis; defendant also requests an immediate Stay of the decision.

WHEREFORE, Defendant State Compensation Insurance Fund respectfully prays that this Petition for Reconsideration be granted, that an immediate Stay of the decision be granted, that the OPINION AND DECISION AFTER RECONSIDERATION dated 02/03/09 be set aside, that the WCAB issue a new OPINION AND DECISION AFTER RECONSIDERATION finding the AMA Guides are not rebuttable, and make such other and further orders as it deems just and proper.

Dated: February 27, 2009

Respectfully submitted,

STATE COMPENSATION INSURANCE FUND

By: 
Darren P. Wong, Attorney

VERIFICATION - CCP 446, 2015.5

I am the attorney for State Compensation Insurance Fund in the above-entitled action or proceeding. I have read the foregoing Petition for Reconsideration and know the contents thereof. I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 27, 2009 at San Francisco, California.

STATE COMPENSATION INSURANCE FUND

By: _____
Darren P. Wong

Mario Almaraz
BAK 0145426; 1078163
02307056

PROOF OF SERVICE BY MAIL - CCP 1031a, 2015.5

I declare that I am employed in the County of San Joaquin, State of California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is: 3247 W. March Lane, Stockton, California 95219-2334. On February 27, 2009, I served the attached Defendant's Request for Judicial Notice in Support of Petition for Reconsideration on the interested parties in said cause, by placing a true copy thereof, enclosed in an envelope addressed as follows:

Workers' Compensation Appeals Board (Hand Delivered)
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Workers' Compensation Appeals Board (Mailed)
P.O. Box 429459
San Francisco, CA 94142-9459

Law Offices of William Wolff
1818 Niles Street
Bakersfield, CA 93305

Glendale Unit 1 (SA) Claims Department

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice such envelope would be sealed and deposited with U.S. postal service on that same day with postage thereon fully prepaid at Stockton, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 27, 2009, at San Francisco, California.

Cheryl Anderson
Cheryl K. Anderson

Mario Almaraz
BAK 0145426; 1078163
02307056